Supreme Court, U.S.
FILED
951026 DEC 26 1995
OFFICE OF THE CLERK
NO.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

MURRAY & MURRAY CO., L.P.A. PROFIT-SHARING PLAN AND TRUST and DENNIS E. MURRAY, SR., its trustee, et al.

Petitioner,

v.

SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the COUNTY OF MARICOPA;

Respondent,

v.

PERFORMANCE INDUSTRIES, INC., fka MR. GASKET COMPANY, INC., an Ohio corporation,

Respondent-Real Party in Interest.

On Petition for Writ of Certiorari to the Supreme Court of Arizona

PETITION FOR WRIT OF CERTIORARI

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December 1995

72 pp

QUESTION PRESENTED

Whether the exercise by an Ohio resident of an Ohio statutory right, standing alone, establishes requisite minimum contacts with the State of Arizona to support an exercise of in personam jurisdiction over petitioner by the Arizona courts consistent with the Due Process Clause of the Fourteenth Amendment.

LIST OF PARTIES

"Petitioner" is, collectively: Murray & Murray Co., L.P.A. Profit-Sharing Plan and Trust and Dennis E. Murray, Sr., its trustee; and Murray & Murray Co., L.P.A. - Dennis Murray Voluntary Account and Dennis E. Murray, Sr., its trustee.

"Respondent" is: Superior Court of the State of Arizona, in and for the County of Maricopa; The Honorable Michael Yarnell, a Judge thereof. The second special action proceeding also involved as Respondent the Superior Court of the State of Arizona, in and for the County of Maricopa; The Honorable Louis A. Araneta, a Judge thereof.

Respondent-Real Party in Interest is fully identified in the caption.

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IN THE SUPREME COURT OF THE UNITED STATES
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No.

MURRAY & MURRAY CO., L.P.A. PROFIT-SHARING PLAN AND TRUST and DENNIS E. MURRAY, SR., its trustee, et al.

Petitioner,

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SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the COUNTY OF MARICOPA;

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PERFORMANCE INDUSTRIES, INC., fka MR. GASKET COMPANY, INC., an Ohio corporation,

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On Petition for Writ of Certiorari to the Supreme Court of Arizona

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Murray & Murray Co., L.P.A Profit-Sharing Plan and Trust, et al., respectfully petitions for a writ of certiorari to review the final decision of the Supreme Court of Arizona, which declined to exercise

discretionary jurisdiction to review the decision of the Court of Appeals of Arizona, which upheld on special action (mandamus) review the decision of the Superior Court of Arizona denying petitioner's Motion to Dismiss for Lack of Personal Jurisdiction.

OPINIONS BELOW

All decisions rendered below by the Arizona state courts below are unreported. The following decisions, rendered below, are reproduced in the Appendix ("App."):

App. 1: September 26, 1995 judgment entry of the Supreme Court of Arizona, denying petition for review of May 9, 1995 decision of Court of Appeals of Arizona.

App. 2: June 20, 1995 decision of the Court of Appeals of Arizona, denying petitioner's motion for reconsideration of May 9, 1995 special action decision.

App. 3: May 9, 1995 decision of the Court of Appeals of Arizona, exercising special action jurisdiction and denying petitioner's request for relief from February 8, 1995 decision of Superior Court of Arizona.

App. 4: February 8, 1995 decision of the Superior Court of Arizona, denying (on remand from Court of Appeals of Arizona) petitioner's Motion to Dismiss for Lack of Personal Jurisdiction.

App. 5: August 24, 1994 decision of the Court of Appeals of Arizona, exercising special action jurisdiction over June 7, 1994 decision of Superior Court of Arizona, and remanding for reconsideration "of Arizona's exercise of personal jurisdiction . . . in light the minimum contacts required. . . ."

App. 6: June 7, 1994 decision of the Superior Court of Arizona, denying petitioner's Motion to Dismiss for Lack of Personal Jurisdiction.

JURISDICTION

The Supreme Court of Arizona denied the petition to review the judgment of the Court of Appeals of Arizona. The entry of the Supreme Court of Arizona denying the petition to review is dated September 26, 1995. (App. 1). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "nor shall

any State deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

A few uncontroverted facts frame this issue of pure Constitutional dimension.

Petitioner is a resident of the State of Ohio. Respondent/real-party-in-interest Performance Industries, Inc. ("Performance") is an Ohio corporation. Performance presently has its principal place of business in Phoenix, Arizona, although it maintains its status as an Ohio corporation.

Petitioner is a shareholder of Performance. Performance undertook an extraordinary corporate transaction, which triggered petitioner's Ohio statutory dissent and appraisal rights under Ohio Rev. Code Section 1701.85 (Ohio Rev. Code Section 1701.85 is reproduced at App. 7.) Ohio Rev. Code Section 1701.85 is a shareholder protection measure that allows a shareholder to dissent from an extraordinary corporate transaction and receive "fair cash value" for the shares. There is no question that the Ohio dissent and appraisal statute was triggered, nor that Ohio law applies.

Petitioner exercised its Ohio statutory rights under Ohio Rev. Code Section 1701.85, in accordance with the strict procedural requirements of the Ohio statute and the instructions of Performance. Performance subsequently instituted this lawsuit under Ohio Rev. Code Section 1701.85, in Arizona, against petitioner and other dissenting shareholders. Performance's current principal place of business made it strategically advantageous for Performance to sue petitioner in Arizona.

Petitioner would be compelled to defend the lawsuit brought by Performance against it, to protect its rights and interests under the Ohio statute. It is uncontroverted that petitioner does not have minimum contacts with the State of Arizona. App. 8 (affidavit of petitioner, submitted in Superior Court of Arizona in support of Motion to Dismiss for Lack of Personal Jurisdiction). Petitioner's exercise of its Ohio statutory rights is the sole and exclusive premise for the assertion of in personam jurisdiction over petitioner by the Arizona courts.

The Record, reviewed below, confirms that petitioner has consistently and exclusively pursued this Fourteenth Amendment Due Process issue related to the

exercise of in personam jurisdiction over a non-resident. Cf. Rule 14.1(h) (requiring petitioner to establish that Court has jurisdiction to review a federal question on writ of certiorari).

In the court of first instance (the Superior Court of Arizona), petitioner entered a special appearance to contest the Superior Court's jurisdiction over petitioner, by way of petitioner's Motion to Dismiss for Lack of Personal Jurisdiction. Petitioner argued that the exercise of jurisdiction by Arizona courts over petitioner would offend "the due process clause of the 14th Amendment," citing International Shoe Co. v. Washington, 326 U.S. 310 (1945). Petitioner's Motion was supported by an uncontroverted affidavit establishing that petitioner has no contacts with the State of Arizona. App. 8. The Superior Court of Arizona denied petitioner's Motion to Dismiss, App. 6. (June 7, 1994), holding that Arizona courts could assert in personam jurisdiction over petitioner on the basis of implied consent. App. 6-5 - 6-6.

Petitioner pursued interlocutory review of the June 7, 1994 decision of the Superior Court pursuant

to Arizona's special action procedure.[1] The Court of Appeals accepted discretionary special action jurisdiction, and remanded the case to the Superior Court. App. 5 (August 24, 1994). The Court of Appeal's special action mandate confirms the Constitutional dimension of this issue:

> [remand] for reconsideration of Arizona's exercise of personal jurisdiction over petitioners in light of the "minimum contacts" required by Shaffer v. Heitner, 433 U.S. 186 (1977) and Batton v. Tennessee Farmers Mutual Ins. Co., 153 Ariz. 268, 736 P.2d 2 (1987).

App. 5-2.

On remand to the Superior Court from the Court of Appeal's special action mandate, petitioner fully briefed the Due Process issue of in personam jurisdiction, arguing that minimum contacts are required under, inter alia, Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985), and International Shoe Co. v. Washington, 326

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[1] The special action is in the nature of an extraordinary writ, e.g., mandamus. See Ariz. Rules of Procedure for Special Actions.

U.S. 310 (1945). The Superior Court, however, again concluded that Arizona courts could exercise jurisdiction over petitioner under the notion of implied consent of petitioner to an Arizona forum. App. 4-5 - 4-8 (February 8, 1995).

Following the February 8, 1995 decision of the Superior Court, petitioner once again petitioned for, and the Court of Appeals again accepted, special action jurisdiction. The Court of Appeals denied relief to petitioner, adopting the February 8, 1995 opinion of the Superior Court. App. 3-2 (May 9, 1995). Petitioner's motion for reconsideration was denied. App. 2 (June 20, 1995).

The Supreme Court of Arizona declined to exercise discretionary review. App. 1 (September 26, 1995). Petitioner framed the federal Constitutional issue: "[t]he assertion of personal jurisdiction over [petitioner] violates the right to due process guaranteed . . . by the Fourteenth Amendment to the United States Constitution. . . ." Petition for Review filed in Arizona Supreme Court, at p. 7.

Accordingly, this Fourteenth Amendment Due Process issue has been continuously and

exclusively pursued through all levels of the Arizona state courts. Because this Fourteenth Amendment issue has wound its way through the state courts of Arizona, this petition is the first (and last) opportunity for a federal court to resolve the burning issue of federal Constitutional law.[2]

REASON FOR GRANTING THE PETITION

This case presents a jurisdictional issue of first impression. This case confronts hollowed Due Process analysis of in personam jurisdiction, in the 1990's context of a statutory shareholder dissent and appraisal proceeding. The exercise by an Ohio resident of an Ohio statutory right involving an Ohio corporation cannot, standing alone, establish requisite minimum contacts with the state of Arizona sufficient for a

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[2] The decisions below reflect the difficulties encountered by the Arizona courts in coming to terms with this Fourteenth Amendment issue. The Superior Court identified existing judicial hostility to the "implied consent" theory that was nevertheless applied. The Court of Appeals twice accepted this issue for special action (mandamus) review. The first Court of Appeals panel ostensibly rejected the implied consent theory, and remanded to the Superior Court with a mandate to conduct the requisite minimum contacts analysis. Notwithstanding this mandate, the Superior Court on remand, and the second special action panel of the Court of Appeals, again applied the implied consent theory, finding that petitioner consented to Arizona jurisdiction. Thus, the second Court of Appeals panel based its decision on a theory that the first Court of Appeals panel ostensibly rejected.

Constitutional exercise of in personam jurisdiction by Arizona's courts over the Ohio resident, in a lawsuit brought in Arizona against the Ohio resident arising out of the exercise of the statutory right. The decision below expands Arizona's in personam jurisdiction far beyond the Due Process boundaries reflected in the traditional minimum contacts test of International Shoe[3] and its progeny.

Petitioner respectfully submits that the decision below should be reversed or vacated, because Arizona courts cannot exercise jurisdiction over petitioner consistent with Due Process. In the alternative, petitioner respectfully urges this Court to remand to the Superior Court of Arizona for consideration of required minimum contacts.

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3 International Shoe Co. v. Washington, 326 U.S. 310 (1945).

I. THE DECISION BELOW VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, BECAUSE MINIMUM CONTACTS NECESSARY FOR THE ARIZONA COURTS TO CONSTITUTIONALLY EXERCISE IN PERSONAM JURISDICTION OVER AN OHIO RESIDENT ARE NOT ESTABLISHED SOLELY BY THE EXERCISE BY THAT OHIO RESIDENT OF AN OHIO STATUTORY RIGHT.

The Constitutional touchstone for the exercise of in personam jurisdiction over a non-resident is whether the defendant has established meaningful "minimum contacts" with the forum state sufficient to protect the liberty interest in the Due Process Clause. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471-72, 474 (1985). The concept of minimum contacts is tied-into the Due Process consideration of "fair play and substantial justice." International Shoe, 326 U.S. at 320. Fair play and substantial justice requires that a defendant be able to predict, with some degree of assurance, whether his own purposeful conduct will render him amenable to suit in a particular forum. Burger King, 471 U.S. at 472. Due process is not satisfied unless the defendant itself **purposefully** creates contacts that

establish a **substantial connection** with the forum state. Burger King, 471 U.S. at 474-75 (citations omitted). Minimum contacts are present if a defendant voluntarily and purposefully "avails itself of the privilege of conducting activities within the forum, thus invoking the benefits and protections of [the forum's] laws." Burger King, 471 U.S. at 475.

The Arizona courts cannot, as a matter of law, exercise in personam jurisdiction over petitioner. The exercise of in personam jurisdiction over petitioner is exclusively grounded upon petitioner's compelled exercise of an Ohio statutory right. The exercise of an Ohio statutory right by an Ohio resident with no contacts or ties with or to Arizona cannot, standing alone, establish requisite minimum contacts with Arizona.

It is "essential" that defendant (here, petitioner) invoke the "benefits and protections" of the forum's laws. Burger King, 471 U.S. at 475. **Petitioner, however, exercised an OHIO STATUTORY RIGHT, not any benefit or protection of Arizona law**. Because Petitioner has not availed itself of any Arizona benefit or protection, the assertion of personal jurisdiction over petitioner by the Arizona courts is unconstitutional.

Requisite minimum contacts cannot, moreover, be engineered or created by the plaintiff (Performance). Rather, the defendant (petitioner) itself must voluntarily and purposefully establish minimum contacts with the forum. Burger King, 471 U.S. at 474-75 (citations omitted). The requirement that defendant itself establish meaningful contacts with the forum precludes the establishment of contacts based upon the "unilateral activity of another party or third person." Burger King, 471 U.S. at 475 (quoting Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 417 (1984)).

The exercise of in personam jurisdiction by Arizona courts over petitioner violates this central principle. Performance -- the plaintiff -- unilaterally and inceptively selected an Arizona forum.[4] The holding below offends Due Process, because in personam jurisdiction is premised on the unilateral machinations of the plaintiff, rather than the purposeful activities of the defendant. Being forced to defend a lawsuit in whatever distant forum the corporate plaintiff unilaterally chooses is, by definition, outside the realm of "fair play and

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[4] To illustrate this point, Performance unilaterally relocated its principal offices to Arizona after petitioner purchased its Performance stock. App. 8 (affidavit of petitioner).

substantial justice." See International Shoe, 326 U.S. at 320.[5]

This Court has repeatedly held that minimum contacts are lacking where, as here, the defendant itself did not establish purposeful contacts with the forum state. See, e.g., World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) (unilateral action of consumer driving vehicle into forum state did not establish requisite minimum contacts with non-resident); Kulko v. Superior Court of California, 436 U.S. 84, 93-94 (1978) (California could not assert in personam jurisdiction over New York resident defendant based on the unilateral activity of plaintiff in moving to California; defendant did not "'purposefully avail himself' of the 'benefits and protections' of California's laws." (citation omitted)); Hanson v. Denckla, 357 U.S. 235, 253-54 (1958) (unilateral activity of trust settlor in moving to Florida was not sufficient for Florida to exercise in personam jurisdiction over Delaware trustee).

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[5] Under the holding below, petitioner would be subject to the jurisdiction of any (and all) of the fifty States, depending exclusively on where Performance unilaterally decided to relocate its principal offices. The degree of predictability flowing from the defendant's purposeful activity, which is required by Due Process, would be totally lost.

It is of no jurisdictional significance that petitioner complied with the strict statutory prerequisites and Performance's own instructions relative to perfecting its Ohio statutory rights.[6] Petitioner's actions were, in this respect, necessary, mandated prerequisites to the effective preservation of its Ohio statutory rights, and were therefore not voluntary and purposeful actions invoking the benefits and protections of Arizona law. See Burger King, supra. This type of metaphysical "effect" in the forum state has never been sufficient to establish meaningful minimum contacts.[7]

The Arizona courts cannot exercise in personam jurisdiction over petitioner, consistent with the Constitutional touchstone of minimum contacts. The Arizona courts below, casting aside the Due Process constraints of the minimum contacts test, rationalized the assertion of jurisdiction over petitioner under a misguided

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[6] For instance, in order to preserve its rights under the strict procedural prerequisites, petitioner was required to send dissent and appraisal papers to Performance's Arizona headquarters -- the headquarters unilaterally selected by Performance.

[7] By way of contrast, this Court held in Burger King that the federal district court for the Southern District of Florida could Constitutionally exercise in personam jurisdiction over Rudzewicz, a Michigan resident, based upon the fact that Rudzewicz "entered into a carefully structured 20 year relationship that envisioned continuing and wide-reaching contacts with Burger King in Florida." 471 U.S. at 480.

notion of "implied consent" by petitioner to an Arizona forum arising from petitioner's exercise of Ohio statutory rights.[8] The Arizona courts thereby expanded the reach of in personam jurisdiction far beyond Due Process limitations.

This notion of "implied consent" is tied to the false premise that petitioner voluntarily elected to exercise its Ohio statutory rights.[9] "Consent" to jurisdiction that passes Due Process scrutiny cannot be extrapolated from the lawful exercise of a statutory right conferred by a non-forum state. Petitioner did not "choose" or "elect" to exercise its rights under Ohio Rev. Code Section 1701.85. Petitioner was, rather, compelled by Performance's own actions to avail itself of the statutory protections to which it was entitled.

Petitioner's only "alternatives" under the fatally-flawed implied consent theory were: (1) "choose" not to exercise its Ohio statutory rights, and thereby forfeit the protections the statute was expressly designed to provide; or (2) "choose" to exercise Ohio statutory

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[8] See, e.g., App. 4-8 (petitioner "consented to jurisdiction, even if unknowingly, by exercising [statutory rights]. . . ."); App. 6-6 ("implied consent by any shareholder exercising appraisal rights under the Ohio statute. . . .").

rights, and thereby forfeit Due Process and be forced to defend a lawsuit in a faraway jurisdiction of Performance's unilateral choosing. The implied consent theory embraced below is inherently flawed because it creates an involuntary, unconstitutional "Catch-22." A Constitutional exercise of in personam jurisdiction over a non-resident cannot be grounded on a theory that requires the defendant -- in either alternative -- to forfeit important rights and protections. A forum cannot acquire in personam jurisdiction over a non-resident in the absence and outside the bounds of required minimum contacts, solely as a consequence of that non-resident's exercise of a statutory right that is not one conferred by the forum state's laws.

Performance has claimed that jurisdiction may be asserted over petitioner based on the notion of implied, under Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea, 456 U.S. 694 (1982). The Insurance Corp. of Ireland case, however, actually highlights the Due Process roadblock to implying consent to jurisdiction in Arizona premised exclusively on the exercise by an Ohio resident of an Ohio statutory

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[9] See, e.g., App. 4-6 - 4-7 (petitioner "elected to exercise"

right. In Insurance Corp. of Ireland, this Court held that a district court could assert personal jurisdiction over a non-resident defendant as a **sanction** for the defendant's contumacious refusal to comply with discovery orders. 456 U.S. at 695. Petitioner, to the contrary, has acted completely within its rights, through exercising an Ohio statutory right. Petitioner's Due Process rights cannot be denied as a sanction. No waiver or forfeiture of Constitutional rights can follow from the lawful exercise of a statutory right.[10]

Nor is petitioner amenable to Arizona jurisdiction by analogy to a voluntary contractual forum selection clause, an argument that Performance advanced and which received a favorable reception below. See App. 4-6 - 4-8.

Exercising a statutory right is not the functional equivalent of a voluntary contractual agreement. Petitioner's exercise of its statutory rights was compelled. Exercise of a statutory right carries with it the full panoply of Due Process protections, which cannot be

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statutory rights).

[10] Furthermore, this Court did not eradicate in Insurance Corp. of Ireland the Due Process safeguards inherent in the minimum contacts test. This Court's holding in Burger King unequivocally

waived or otherwise taken away as a consequence of the lawful exercise of the statutory right.

Performance argued below that the Ohio dissent and appraisal statute "required" Performance to sue petitioner in Arizona. The misguided conception of what the Ohio statute "required" of Performance does not supersede the minimum contacts that are necessary for Arizona to assert jurisdiction over petitioner consistent with Due Process.

In the first place, the Ohio dissent and appraisal statute specifies that an action under the statute be brought in the "court of common pleas," a clear identification of Ohio's trial courts of general jurisdiction. See App. 7. The Model Business Corporation Act ("MBCA"), Revised Model Business Corporation Act ("RMBCA"), and Delaware law all specify that a statutory dissent and appraisal proceeding be maintained in the state of incorporation. See MBCA, § 81; RMBCA, § 13.30; 9 Del. Code § 262. Just recently, a Missouri state appellate court upheld a decision that a Delaware dissent and appraisal proceeding must proceed in Delaware state

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requires that a State's exercise of in personam jurisdiction over a non-resident defendant be premised on minimum contacts.

court. Wilson v. Celestial Greetings, Inc., 896 S.W. 2d 759, 762 (Mo. Ct. App. 1995).[11]

Even if the Ohio dissent and appraisal statute suffers from ambiguity concerning where a dissent and appraisal proceeding may be brought, that ambiguity must be resolved in such a way as to uphold the Constitutionality of the statute. The Ohio dissent and appraisal statute, accordingly, must be construed to require an appraisal proceeding to be brought in Ohio, because Performance is an Ohio corporation.[12] The Ohio dissent and appraisal statute cannot be construed to require that a shareholder forfeit Due Process protections in order to avail itself of statutory protections.

The Ohio dissent and appraisal statute and Due Process are reconciled by the principle that the state of incorporation provides requisite minimum contacts with shareholders. See, e.g., Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950) (establishing right of state court under whose law trust is created and established to determine interests of all claimants --

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[11] Furthermore, Ohio has a compelling interest in adjudicating a proceeding involving an Ohio statute that applies to an Ohio corporation.

resident and non-resident). See also Hynson v. Drummond Coal Co., Inc., 601 A.2d 570, 579 (Del. Ch. 1991) (buying stock of Delaware corporation establishes nexus with Delaware sufficient for in personam jurisdiction of Delaware court in matters of internal corporate governance). There is a fundamental distinction between the state of incorporation (and whose laws the corporation is thereby governed by), and the state(s) where the corporation unilaterally decides at any point in time to relocate its principal office. The nexus between a shareholder and the state of incorporation establishes requisite minimum contacts, without resorting to an indefensible theory of jurisdiction such as implied consent. Performance was required to bring the statutory dissent and appraisal proceeding under Ohio Rev. Code Section 1701.85 in Ohio common pleas court.

In the final analysis, Arizona courts have exercised in personam jurisdiction over petitioner in the absence of minimum contacts, premised exclusively on the exercise by petitioner of an Ohio statutory right. Because Arizona has expanded its in personam

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[12] An Ohio statutory dissent and appraisal proceeding is required to be brought in Ohio because Performance is an Ohio corporation, not because petitioner happens to be an Ohio resident.

jurisdiction over non-residents far beyond the Constitutional bounds of minimum contacts, this case cries out for relief.

CONCLUSION

Petitioner respectfully submits that the Petition for Writ of Certiorari should be granted, and the judgment below reversed. In the alternative, petitioner respectfully urges this Court to grant this Petition, and remand this case to the Superior Court for resolution of petitioner's minimum contacts with the State of Arizona.

Respectfully submitted.

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December 1995

APPENDIX 1

Supreme Court
State of Arizona

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September 29, 1995

RE: MURRAY & MURRAY CO L.P.A. PROFIT-SHARING PLAN & TRUST et al vs. HON. MICHAEL YARNELL - MAR CO SUP CT/PERFORMANCE INDUSTRIES

Supreme Court No. CV-95-0336-PR
Court of Appeals No. 1 CA-SA 95-0104
Maricopa County No. CV 94-00235

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on September 26, 1995, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

Justice Corcoran did not participate in the determination of this matter.

Record returned to Court of Appeals, Division One, Phoenix, this 29th day of September, 1995.

Noel K. Dessaint, Clerk

TO:
Dennis E. Murray, Sr., Esq. And David D. Yeagley, Esq., Murray & Murray Co., L. P. A.
H. Sullivan Bunch, Esq. And Scott A. Erickson, Esq., Bonnett,
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APPENDIX 2

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

MURRAY & MURRAY COMPANY, L.P.A. PROFIT SHARING PLAN AND TRUST and DENNIS E. MURRAY, SR., its trustee; and MURRAY & MURRAY COMPANY, L.P.A. - DENNIS MURRAY VOLUNTARY ACCOUNT and DENNIS E. MURRAY, SR., its trustee,	) 1 CA-SA 94-0214) DEPARTMENT D) Maricopa County) Superior Court) No. CV 94-00235
Petitioners,	
v.	
SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of Maricopa, THE HONORABLE MICHAEL YARNELL, a Judge thereof,	
Respondent Judge,	ORDER
PERFORMANCE INDUSTRIES, INC., fka MR. GASKET COMPANY, INC., an Ohio Corporation,	
Real Parties in Interest.	

The Court has received Petitioners' Motion for Reconsideration and the response thereto; after consideration,

IT IS ORDERED denying the Motion for Reconsideration.

DATED this 20th day of June, 1995.

/s/ E.G. Noyes, Jr.
E.G. Noyes, Jr., Presiding Judge

1 CA-SA 94-0214

June 20, 1995

MARICOPA COUNTY
Superior Court
CV 94-00235

A true copy of the foregoing order was mailed June 20, 1995 to:

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1 CA-SA 95-0104

Honorable Michael A. Yarnell, Judge
MARICOPA COUNTY SUPERIOR COURT
Central Court Building
201 West Jefferson Street
Phoenix, AZ 85003-2205

Glen D. Clark, Clerk
By
/s/ Leeann Williams
Deputy Clerk

APPENDIX 3

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

MURRAY & MURRAY COMPANY, L.P.A. PROFIT SHARING PLAN AND TRUST and DENNIS E. MURRAY, SR., its trustee; and MURRAY & MURRAY COMPANY, L.P.A. - DENNIS MURRAY VOLUNTARY ACCOUNT and DENNIS E. MURRAY, SR., its trustee,	) 1 CA-SA 94-0214) DEPARTMENT D) Maricopa County) Superior Court) No. CV 94-00235
Petitioners,	)
v.	)
SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of Maricopa, THE HONORABLE MICHAEL YARNELL, a Judge thereof,	)
Respondent Judge,	) ORDER
PERFORMANCE INDUSTRIES, INC., fka MR. GASKET COMPANY, INC., an Ohio Corporation,	)
Real Parties in Interest.	)

This special action came on regularly for conference this 9th day of May, 1995, before Presiding Judge E.G. Noyes, Jr. and Judges Edward C. Voss and

Sarah D. Grant participating. The matter was taken under advisement. After consideration,

IT IS ORDERED that the Court of Appeals, in the exercise of its discretion, accepts jurisdiction in this special action, and denies relief for the reasons and authorities provided in Judge Araneta's minute entry of February 8, 1995.

DATED this 9th day of May, 1995.

/s/ E.G. Noyes, Jr.
E.G. Noyes, Jr., Presiding Judge

1 CA-SA 94-0214

May 9, 1995

MARICOPA COUNTY
Superior Court
CV 94-00235

A true copy of the foregoing order was mailed
May 9, 1995 to:

Mr. H. Sullivan Bunch
BONNETT, FAIRBOURN, FRIEDMAN,
HIENTON, MINER & FRY, P.C.
Suite 1100
4041 North Central Avenue
Phoenix, AZ 85012-3311
And

Mr. Scott A. Erickson
BONNETT, FAIRBOURN, FRIEDMAN,
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Attorneys for Petitioners

Mr. Dennis E. Murray, Sr.
MURRAY & MURRAY CO., L.P.A.
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And

Mr. David D. Yeagley
MURRAY & MURRAY CO., L.P.A.
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PO Box 19
Sandusky, Ohio 44871-0019
Co Counsel for Petitioners

Mr. John T. Moshier
RIDENOUR, SWENSON, CLEERE &
EVANS, P.C.
Suite 900
302 North First Avenue
Phoenix, AZ 85003
Attorneys for Real Party in Interest

Glen D. Clark, Clerk
By
/s/ Leeann Williams
Deputy Clerk

APPENDIX 4

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

February 8, 1995 HON. LOUIS A. ARANETA S. Bailey
Deputy

No. CV 94-00235

PERFORMANCE INDUSTRIES, INC. et al. John E. Moshier

v.

DAVID E. MILLER, et al. Dennis E. Murray, Sr.

David D. Yeagley
Murray & Murray
111 E. Shoreline Dr.
Sandusky, OH 44871

After argument, the Court reviewed the pleadings, the court file and case law in regard to the Motion for Reconsideration filed by Defendants Murray & Murray Company LPA Profit Sharing Plan & Trust and Murray & Murray Company LPA Pension Plan and Trust (Defendants). Based on such review the Court makes the following findings and orders.

1. On June 7, 1994, the earlier trial court Judge Yarnell issued a minute entry ruling denying Defendants' Motion to Dismiss for Lack of Personal Jurisdiction. More specifically Judge Yarnell found that the Ohio General Corporation Statute Section 1701.85 could be applied by an Arizona court to determine "fair cash value" under Ohio law when dissenting shareholders seek to exercise their dissent and appraisal rights as a substantive remedy. Judge Yarnell also held that the Arizona trial court could constitutionally assert specific jurisdiction over Defendants to resolve this action having found consent to jurisdiction by the Defendants.

2. In response to the special action brought by Defendants on August 24, 1994, the Court of Appeals remanded "this case to the trial court for reconsideration of Arizona's exercise of personal jurisdiction over Petitioners in light of the 'minimum contacts' required by Shaffer v. Heitner, 433 U.S. 186 (1977), and Batton v. Tennessee Farmers Mutual Ins. Co., 153 Ariz. 268, 736 P.2d 2 (1987) . . ."

3. Performance Industries, Inc., (Plaintiff) emphasizes that the Court of Appeals did not directly reject Judge Yarnell's finding that "Jurisdiction

over a party can be exercised by virtue of his consent, even if he has no contacts whatsoever with the foreign state. Insurance Corp. of Ireland v. Compagnie des Bauxite's, 456 U.S. 694 (1982), National Equipment Rental v. Szukhent, 375 U.S. 311 (1964) . . ." (See page 4 of Judge Yarnell's minute entry of June 7, 1994.)

4. Major factors intrinsic to this action include:

a. Plaintiff Performance was incorporated in Ohio,

b. Defendants are residents of Ohio,

c. Since May 1993 Plaintiff Performance has had its principal place of business in Maricopa County,

d. Section 1701.85 of the Ohio Revised Code recognizes that a shareholder's dissent and appraisal action may be brought "in the Court of Common Pleas of the county in which the principal office of the corporation which issued such shares is located or was located at the time when the proposal was adopted by the shareholders of the corporation . . .",

e. Plaintiff has no offices, business operations or employees in Ohio,

f. Plaintiff mailed from Maricopa County to Defendants its proxy statement advising Defendants that dissenting from the proposed transaction would subject Defendants to suit in Maricopa County,

g. In November 1993 Defendants voted their proxies in opposition to the proposed transaction and sent them to Plaintiff in Maricopa County,

h. On November 29, 1993, the shareholders of Plaintiff voted in favor of selling Plaintiff's company assets to Walker Manufacturing Company (the Walker transaction),

i. On December 7, 1993, Defendants sent to Plaintiff in Maricopa County their dissenter's demand,

j. On December 10, 1993, Plaintiff demanded that Defendants deliver their stock certificates to Plaintiff in Maricopa County so that the certificates could be endorsed with restrictive legends in accord with Section 1701.85,

k. In December 1993 Plaintiff caused its stock certificates to be delivered to plaintiff in Maricopa County, and

l. On January 6, 1994, Plaintiff filed its Complaint against Defendants in Maricopa County.

5. Defendants have argued that the circumstances of this case do not establish "minimum contacts" for either in rem jurisdiction under Shaffer v. Heitner or "purposeful activities" for minimum contacts under Batton, supra. This Court acknowledges that the circumstances of this case, involving the subsequent relocation of Plaintiff's principal offices to Arizona and the Defendants' exercise of their dissent and appraisal rights by mailing to Plaintiff in Arizona, may not readily fit the decisions in Batton or Shaffer, supra, as readily as other cases.

6. This Court finds that the decisions in Shaffer and Batton do not exclude Judge Yarnell's prior finding and this Court's current finding of consent to jurisdiction. The decision by Judge Yarnell was that Arizona law under Morgan Bank (Delaware) v. Wilson, 164 Ariz. 535, 537, 794 P.2d 959, 961 (App. 1990), when

applied to the circumstances of this case, supports the finding that Arizona may constitutionally assert specific jurisdiction over Defendants to resolve the issue to be litigated: the value of the stock. In Morgan Bank, the Court of Appeals found: "Where a forum selection clause is held enforceable, the necessity for a due process analysis of the type and extent of the Defendant's contacts with the forum . . . is obviated". The Morgan Bank court found that consent is a constitutionally sufficient and dispositive "minimum contact". The "minimum contact" test is satisfied where there is consent. When parties, by agreement, preselect a forum, their selection of the forum is a sufficient minimum contact with that forum as a matter of law. National Equipment Rental, Ltd. v. Szukhent, 375 U.S. 311, 316 (1964). Here, the Ohio statute clearly allowed that a dissent and appraisal action may be brought in the court in which the principal office of the corporation is located. The remedy to Defendants is purely statutory. Armstrong v. Marathon Oil Co., 32 Ohio St. 3d 397, 513 N.E. 2d 776, 781-82 (1987). Without Ohio Statute Section 1701.85, Defendants, as minority shareholders, would have no right of dissent and appraisal. Having elected to exercise

their statutory rights, Defendants are bound to follow the procedures set forth in Section 1701.85. Judge Yarnell found: "The statutory provisions are now and have always been part of the company-shareholder relationship. That relationship is founded in contract and the statutory law of Ohio. It is neither unfair, nor unexpected, that a shareholder may, under such statutory provisions, be hailed [sic] into court in the stated principal business of a corporation." Page 5 of minute entry dated June 7, 1994.

7. The "Catch 22" assertion by Defendants that their exercise of their dissent and appraisal rights unfairly transfers such action to Arizona is nothing more than the application of the Ohio statute which governed the statutory rights and relationships of the parties. Here, the factual nexus among shareholder, corporation and jurisdiction-selecting statute is constitutionally sufficient to support a single action in Arizona. From a constitutional standpoint the burden on a non-resident shareholder is the same in Ohio, where the corporation was formed, or in Arizona where the corporation is located

8. In this case jurisdiction in Arizona is specified by the applicable Ohio statute. The statutory

provision, stating that this action may be brought in the jurisdiction where the office of the Plaintiff corporation is located, is stated as clearly as a contractual forum selection clause would do so. Defendants consented to jurisdiction, even if unknowingly, by exercising their right to dissent under the same statute that recognizes this action in Arizona. The statute's designation of what has become the Arizona forum provides the requisite dispositive contact with Arizona.

THEREFORE, IT IS ORDERED denying the Defendant's Motion to Dismiss for Lack of Personal Jurisdiction.

Upon agreement by both Plaintiff and Defendants, and the Court finding good cause,

IT IS ORDERED that the entry of this ruling and judgment is a final judgment as to jurisdiction and no just reason for delay exists for entry of this ruling as a final judgment.

The signature of the Court shall serve as a formal order pursuant to Rule 58, ARCP.

2-8-95
Date

/s/ Louis A. Araneta
LOUIS A. ARANETA
SUPERIOR COURT JUDGE

APPENDIX 5

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

MURRAY & MURRAY COMPANY, L.P.A. PROFIT SHARING PLAN AND TRUST and DENNIS E. MURRAY, SR., its trustee; and MURRAY & MURRAY COMPANY, L.P.A. - DENNIS MURRAY VOLUNTARY ACCOUNT and DENNIS E. MURRAY, SR., its trustee,	) 1 CA-SA 94-0214) DEPARTMENT D) Maricopa County) Superior Court) No. CV 94-00235
Petitioners,	
v.	
SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of Maricopa, THE HONORABLE MICHAEL YARNELL, a Judge thereof,	
Respondent Judge,	ORDER
PERFORMANCE INDUSTRIES, INC., fka MR. GASKET COMPANY, INC., an Ohio Corporation,	
Real Parties in Interest.	

This special action came on regularly for conference this 24th day of August, 1994, before Presiding Judge Susan A. Ehrlich and Judges Sheldon H.

Weisberg and Sarah D. Grant, and the matter was taken under advisement. After consideration,

IT IS ORDERED that the court of appeals, in the exercise of its discretion, accepts jurisdiction.

IT IS FURTHER ORDERED remanding this case to the trial court for reconsideration of Arizona's exercise of personal jurisdiction over petitioners in light of the "minimum contacts" required by Shaffer v. Heitner, 433 U.S. 186 (1977) and Batton v. Tennessee Farmers Mutual Ins. Co., 153 Ariz. 268, 736 P.2d 2 (1987), and thereafter, such further proceedings as are appropriate.

DATED this 24th day of August, 1994.

/s/ Susan A. Ehrlich
Susan A. Ehrlich
Presiding Judge

1 CA-SA 94-0214

August 24, 1994

MARICOPA COUNTY
Superior Court
CV 94-00235

A true copy of the foregoing order was mailed
August 24, 1994 to:

Mr. H. Sullivan Bunch
BONNETT, FAIRBOURN, FRIEDMAN,
HIENTON, MINER & FRY, P.C.
Suite 1100
4041 North Central Avenue
Phoenix, AZ 85012-3311
And

Mr. Scott A. Erickson
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Phoenix, AZ 85012-3311
Attorneys for Petitioners

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And

Mr. David D. Yeagley
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Co Counsel for Petitioners

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Attorneys for Real Party in Interest

APPENDIX 6

SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

June 7, 1994

THE HONORABLE MICHAEL A. YARNELL

L. Nava, Deputy

No. CV 94-00235

PERFORMANCE INDUSTRIES, INC., fka: MR. GASKET COMPANY, INC., John T. Moshier

v.

ECCO SALES, INC., et. al. Dennis E. Murray, Sr.

This matter involves a statutory appraisal procedure under the law of Ohio of common stock in Performance Industries, Inc. ("Performance") owned by Murray & Murray Company's ("Murray Defendants"). Defendants' Motion to Dismiss for Lack of Personal Jurisdiction has been under advisement.

Defendants contend this court lacks subject matter and personal jurisdiction. Under a literal interpretation of the Ohio General Corporation Law § 1701.85 statutory language, the appraisal proceeding

must be brought in the "court of common pleas of the county...". Defendants argue the use of the uncommon name of Ohio's trial courts, courts of "common pleas", must refer only to an Ohio action. In addition, Defendants argue they have not consented to jurisdiction in Arizona. According to Defendants, regardless of whether viewed as an in rem or in personam action, minimum contacts analysis is required

[sic] -- since Defendants have no contacts with Arizona the court lacks personal jurisdiction.

Plaintiff contends this court possesses subject matter jurisdiction by applying an analogous court doctrine and a constitutional Full Faith and Credit argument to the Ohio General Corporation Law § 1701.85. Plaintiff also contends Defendants consented to jurisdiction by exercising their statutory dissenting shareholder rights. In the alternative, Plaintiff contends this action is in rem (or quasi in-rem) and therefore, a minimum contacts analysis is not required to assert personal jurisdiction.

It is undisputed in this case that Plaintiff is an Ohio corporation with its principal place of business located in Tempe, Arizona. It is undisputed that the stock

was issued to the Defendants while Plaintiff maintained its principal place of business in Ohio, Defendants are resident of Ohio, and other than the stock appraisal process, Defendants have no contact with Arizona.

Subject Matter Jurisdiction Issue

Even if Ohio is attempting to restrict appraisal actions to its courts, this restriction would be invalid. The Restatement provides:

> § 91. Attempted Localization of Action
>
> A state may entertain an action even though the state of the applicable law has provided that action on the particular claim shall not be brought outside its territory.

Restatement (Second) Conflict of Laws § 91 (1971); Tennessee Coal, Iron & Railroad Co. v. George, 233 U.S. 354 (1914) (holding that under the Full faith and Credit Clause a state may not create a statutory right and then restrict its enforcement to its own courts).

In determining which forum court is the proper court to hear a matter regarding foreign law the Restatement states the rule as follows:

> § 123. Proper Court.

> The local law of the forum determines which of its courts, if any, may entertain an action on a claim involving foreign elements.

Restatement (Second) Conflict of Laws § 123 (1971). Arizona law provides that appraisal actions should be brought in Superior courts. Arizona has access to adequate information regarding how to determine "fair cash value" under Ohio statute. Michael G. Schinner, Dissenting Shareholder' Statutory Right to Fair Cash Value: Armstrong v. Marathon Oil Co., Akron L. Rev., 261, (1989). In addition, the Ohio Courts of Common Pleas are equivalent trial courts to the Superior courts in Arizona.

The Ohio General Corporation § 1701.85 states:

> § 1701.85(B) Qualifications and procedures for dissenting shareholders.
>
> .."The shareholder or the corporation . . .[may] file a petition in the court of common pleas of the county in which the principal office of the corporation which issues such shares is located, or was located at the time when the proposal was adopted by the shareholders of the corporation, or, if the same was not required to be submitted to

the shareholders was approved by the directors."

The Plaintiff's principal place of business is located in Arizona, and was located in Arizona at the time when the proposal was adopted by the shareholders.[1] Therefore, this is the appropriate analogous court of competent jurisdiction to hear this matter.

Personal Jurisdiction Issue

No party contends that Defendants have "substantial" or "continuous and systematic" contacts with Arizona. This court does not have general jurisdiction over the Defendants. The issue is whether or not Arizona may constitutionally assert specific jurisdiction over Defendants to resolve the issue in this case: the value of the stock.

Jurisdiction over a party can be exercised by virtue of his consent, even if he has no contacts whatsoever with the forum state. Insurance Corp. of Ireland v. Compagnie des Bauxites, 456 U.S. 694 (1982); National Equipment Rental v. Szukhent, 375 U.S. 311 (1964) (holding that Defendants had consented to the jurisdiction of the New York federal district court by

signing a contract which designated a third person to receive process for them for a suit in New York, should one arise). Here, page 6 of the November 8, 1993 proxy statement advised the Defendant "... the Shareholder or the Company ... may file a complaint in the Superior Court of Maricopa County, Arizona."

Plaintiff points out that Defendants made their written demand on December 7, 1993 for payment of fair cash value of the Shares for which they sought relief in compliance with this same proxy. This demand was mailed to the Plaintiff in Arizona. Plaintiff argues Defendants voluntarily exercised their dissenters rights without opposition to the proxy's forum selection clause and thus implied consent may be inferred from the Defendants' silence.

Defendant contends the demand serves only a notice purpose that the shareholder prefers to sever his connection with the corporation. See Armstrong v. Marathon Oil Co., 513 N.E. 2d 766, 793 (Ohio 1987). Defendant argues that no consent may be implied and a minimum contacts analysis is needed in all cases. Shaffer v. Heitner, 433 U.S. 186 (1977); Bower v.

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[1] This court does not reach the issue of whether or not the

C.J. Timm Investment Company, 630 A. 2d 678 (Fla. App. 2 Dist. 1994).

Despite the recent hostility to implied consent concepts in the Arizona case law[2], under a statutory stock appraisal scheme such as Ohio's the better reasoned view is to find implied consent by any shareholder exercising appraisal rights under the Ohio statute to be sued in the forum of the Ohio Corporation's then principal place of business.[3] The statutory provisions are now and have always been part of the company-shareholder relationship. That relationship is founded in contract and the statutory law of Ohio. It is nether unfair, nor unexpected, that a shareholder may, under such statutory provisions be hailed [sic] into court in the state of principal business of the corporation.

For instance, the Ohio statute states "[o]their dissenting shareholders, within the period of three months, may join as plaintiffs . . or defendants in any such proceeding, and any two or more such proceedings may be consolidated." If some higher

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statutory appraisal action might also be brought in Ohio.

[2] See Batton v. Tennessee Farmers Mut. Ins. Co., 153 Ariz. 268, 786 P.3d 2 (1987).

standard of "minimum contact" was constitutionally required for each shareholder, a large potential for multiple actions in different jurisdictions resulting in different appraisal valuations is created. Such a result is unexpected, unfair, and does not serve the legitimate interests of any party or any forum.

Accordingly, IT IS ORDERED denying Defendant's motion to dismiss for lack of personal jurisdiction.

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[3] This consent may be viewed as either occurring upon stock purchased or upon submitting the demand to utilize the Ohio statutory procedure.

APPENDIX 7

1701.85 Qualifications of and procedures for dissenting shareholders

(A)(1) A shareholder of a domestic corporation is entitled to relief as a dissenting shareholder in respect of the proposals described in sections 1701.74, 1701.76, and 1701.84 of the Revised Code, only in compliance with this section.

(2) If the proposal must be submitted to the shareholders of the corporation involved, the dissenting shareholder shall be a record holder of the shares of the corporation as to which he seeks relief as of the date fixed for the determination of shareholders entitled to notice of a meeting of the shareholders at which the proposal is to be submitted, and such shares shall not have been voted in favor of the proposal. Not later than ten days after the date on which the vote on the proposal was taken at the meeting of the shareholders, the dissenting shareholder shall deliver to the corporation a written demand for payment to him of the fair cash value of the shares as to which he seeks relief, which demand shall state his address, the number and class of such

shares, and the amount claimed by him as the fair cash value of the shares.

(3) The dissenting shareholder entitled to relief under division (C) of section 1701.84 of the Revised Code in the case of a merger pursuant to section 1701.80 of the Revised Code and a dissenting shareholder entitled to relief under division (E) of section 1701.84 of the Revised Code in the case of a merger pursuant to section 1701.801 of the Revised Code shall be a record holder of the shares of the corporation as to which he seeks relief as of the date on which the agreement of merger was adopted by the directors of that corporation. Within twenty days after he has been sent the notice provided in section 1701.80 or 1701.801 of the Revised Code, the dissenting shareholder shall deliver to the corporation a written demand for payment with the same information as that provided for in division (A)(2) of this section.

(4) In the case of a merger or consolidation, a demand served on the constituent corporation involved constitutes service on the surviving or the new entity, whether the demand is served before, on, or after the effective date of the merger or consolidation.

(5) If the corporation sends to the dissenting shareholder, at the addresses specified in his demand, a request for the certificates representing the shares as to which he seeks relief, the dissenting shareholder, within fifteen days from the date of the sending of such request, shall deliver to the corporation the certificates requested so that the corporation may forthwith endorse on them a legend to the effect that demand for the fair cash value of such shares has been made. The corporation promptly shall return such endorsed certificates to the dissenting shareholder. A dissenting shareholder's failure to deliver such certificates terminates his rights as a dissenting shareholder, at the option of the corporation, exercised by written notice sent to the dissenting shareholder within twenty days after the lapse of the fifteen-day period, unless a court for good cause shown otherwise directs. If shares represented by a certificate on which such a legend has been endorsed are transferred, each new certificate issued for them shall bear a similar legend, together with the name of the original dissenting holder of such shares. Upon receiving a demand for payment form a dissenting shareholder who is the record holder of uncertificated securities, the corporation shall make an

appropriate notation of the demand for payment in its shareholder records. If uncertificated shares for which payment has been demanded are to be transferred, any new certificate issued for the shares shall bear the legend required for certified securities as provided in this paragraph. A transferee of the shares so endorsed, or of uncertificated securities where such notation has been made, acquires only such rights in the corporation as the original dissenting holder of such shares had immediately after the service of a demand for payment of the fair cash value of the shares. A request under this paragraph by the corporation is not an admission by the corporation that the shareholder is entitled to relief under this section.

(B) Unless the corporation and the dissenting shareholder have come to an agreement on the fair cash value per share of the shares as to which the dissenting shareholder seeks relief, the dissenting shareholder or the operation, which in case of a merger or consolidation may be the surviving or new entity, within three months after the service of the demand by the dissenting shareholder, may file a complaint in the court of common pleas of the county in which the principal office of the corporation that issued the shares is located or was

located when the proposal was adopted by the shareholders of the corporation, or, if the proposal was not required to be submitted to the shareholders, was approved by the directors. Other dissenting shareholders, within that three-month period, may join as plaintiffs or may be joined as defendants in any such proceeding, and any two or more such proceedings may be consolidated. The complaint shall contain a brief statement of the facts, including the vote and the facts entitling the dissenting shareholder to the relief demanded. No answer to such a complaint is required. Upon the filing of such a complaint, the court, on motion of the petitioner, shall enter an order fixing a date for a hearing on the complaint and requiring that a copy of the complaint and a notice of the filing and of the date for hearing be given to the respondent or defendant in the manner in which summons is required to be served or substituted service is required to be made in other cases. On the day fixed for the hearing on the complaint or any adjournment of it, the court shall determine from the complaint and from such evidence as is submitted by either party whether the dissenting shareholder is entitled to be paid the fair cash value of any shares and, if so, the

number and class of such shares. If the court finds that the dissenting shareholder is so entitled, the court may appoint one or more persons as appraisers to receive evidence and to recommend a decision on the amount of the fair cash value. The appraisers have such power and authority as is specified in the order of their appointment. The court thereupon shall make a finding as to the fair cash value of a share and shall render judgment against the corporation for the payment of it, with interest at such rate and from such date as the court considers equitable. The costs of the proceeding, including reasonable compensation to the appraisers to be fixed by the court, shall be assessed or apportioned as the court considers equitable. The proceeding is a special proceeding and final orders in it may be vacated, modified, or versed on appeal pursuant to the Rules of Appellate Procedure and, to the extent not in conflict with those rules, Chapter 2505. of the Revised Code. If; during the pendency of any proceeding instituted under this section, a suit or proceedings is or has been instituted to enjoin or otherwise to prevent the carrying out of the action as to which the shareholder has dissented, the proceeding instituted under this section

shall be stayed until the final determination of the other suit or proceeding. Unless any provision in division (D) of this section is applicable, the fair cash value of the shares that is agreed upon by the parties or fixed under this section shall be paid within thirty days after the date of final determination of such value under this division, the effective date of the amendment to the articles, or their consummation of the other action involved, whichever occurs last. Upon the occurrence of the last such event, payment shall be made immediately to a holder of uncertificated securities entitled to such payment. In the case of holders of shares represented by certificates, payment shall be made only upon and simultaneously with the surrender to the corporation of the certificates representing the shares for which the payment is made.

(C) If the proposal was required to be submitted to the shareholders of the corporation, fair cash value as to those shareholders shall be determined as of the day prior to the day on which the vote by the shareholders was taken and, in the case of a merger pursuant to section 1701.80 or 1701.801 of the Revised Code, fair cash value as to shareholders of a constituent subsidiary corporation shall be determined as of the day before the

adoption of the agreement of merger by the directors of the particular subsidiary corporation. The fair cash value of a share for the purposes of this section is the amount that a willing seller who is under no compulsion to sell would be willing to accept and that a willing buyer who is under no compulsion to purchase would be willing to pay, but in no event shall the fair cash value of a share exceed the amount specified in the demand of the particular shareholder. In computing such fair cash value, any appreciation or depreciation in market value resulting from the proposal submitted to the directors or to the shareholders shall be excluded.

(D)(1) The right and obligation of a dissenting shareholder to receive such fair cash value and to sell such shares as to which he seeks relief, and the right and obligation of the corporation to purchase such shares and to pay the fair cash value of them terminates if any of the following applies:

(a) The dissenting shareholder has not complied with this section, unless the corporation by its directors waives such failure;

(b) The corporation abandons the action involved or is finally enjoined or prevented from carrying it out, or

the shareholders rescind their adoption of the action involved;

(c) The dissenting shareholder withdraws his demand, with the consent of the corporation by its directors;

(d) The corporation and the dissenting shareholder have not come to an agreement as to the fair cash value per share, and neither the shareholder nor the corporation has filed or joined in a complaint under division (B) of this section within the period provided in that division.

(2) For purposes of division (D)(1) of this section, if the merger or consolidation has become effective and the surviving or new entity is not a corporation, action required to be taken by the directors of the corporation shall be taken by the general partners of a surviving or new partnership or the comparable representatives of any another surviving or new entity.

(E) From the time of the dissenting shareholder's giving of the demand until either the termination of the rights and obligations arising from it or the purchase of the shares by the corporation, all other rights accruing from such shares, including voting and

dividend or distribution rights, are suspended. If during the suspension, any divided or distribution is paid in money upon shares of such class or any dividend, distribution, or interest is paid in money upon any securities issued in extinguishment of or in substitution for such shares, an amount equal to the dividend, distribution, or interest which, except for the suspension, would have been payable upon such shares or securities, shall be paid to the holder of record as a credit upon the fair cash value of the shares. If the right to receive fair cash value is terminated other than by the purchase of the shares by the corporation, all rights of the holder shall be restored and all distributions which, except for the suspension, would have been made shall be made to the holder of record of the shares at the time of termination.

(1994 S 74, eff. 7-1-94; 1988 H 708, eff. 4-19-88; 1986 H 428, H 412, H 902; 1984 S 283, H 250; 1974 S 155; 1970 S 158)

APPENDIX 8

Dennis E. Murray, Sr. (#0008783)
MURRAY & MURRAY CO., L.P.A.
Attorneys at Law
300 Central Avenue
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FAX: 1-419-624-0707

Attorneys for Murray Defendants

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

PERFORMANCE INDUSTRIES, INC., fka MR. GASKET CO., INC., an Ohio corporation, Plaintiff,	)	Case No. CV 94-00235
-vs-	)	
ECCO SALES, INC. DEFINED BENEFIT PLAN and DAVID E. MILLER, its trustee, et al., Defendants.	)	**AFFIDAVIT** of Dennis E. Murray, Sr., in Support of Motion to Dismiss for Want of Personal Jurisdiction

STATE OF OHIO)
) ss.
COUNTY OF ERIE)

Dennis E. Murray, Sr., being first duly sworn, says that:

1. Murray & Murray Co., L.P.A., Profit-Sharing Plan and Trust; Murray & Murray Co., L.P.A., Pension Plan and Trust -- Dennis Murray Voluntary Account; and Dennis E. Murray, Sr., Trustee (Murray defendants), have never conducted any business within, or with any identifiable impact upon, the State of Arizona; have never conducted any business under or pursuant to the privilege of Arizona law; and have never had any assets within the State of Arizona. Murray defendants are located solely within the State of Ohio and have conducted business only within the State of Ohio.

2. The action filed by Performance Industries, Inc., in this Court is a matter which arises out of the issue of ownership interests in an Ohio corporation, Performance Industries, Inc., which has offices in the State of Ohio.

3. Plaintiff, Performance Industries, Inc., is an Ohio corporation. The Murray defendants purchased ownership interest in Performance Industries, Inc., when its only principal place of business was in the State of Ohio.

4. The plaintiff seeks to invoke this Court's jurisdiction over the Murray defendants, in part, pursuant to the Arizona Declaratory Judgments Act. The Murray defendants have taken no action which would subject them to Arizona jurisdiction, especially as it relates to the cause of action for declaratory judgment pursuant to the Arizona Declaratory Judgments Act.

5. The Murray defendants have filed an action in the Common Pleas Court of Cuyahoga County, Ohio, to declare certain shareholder obligations owning from Performance Industries, Inc., to the Murray defendants.

6. Certain individual defendants are necessary parties to the Performance Industries, Inc., action; and at least one of these individuals resides within the State of Ohio.

7. Ohio law governs this transaction.

Further Affiant sayeth not.

/s/ Dennis E. Murray
Dennis E. Murray, Sr.

Sworn to before me and subscribed in my presence this 28th day of January, 1994.

/s/ Winona S. Agsten
Notary Public

CERTIFICATION

This is to certify that a copy of the foregoing Affidavit of Dennis E. Murray, Sr., in Support of Motion to Dismiss for Want of Personal Jurisdiction was served upon all parties in the foregoing cause by sending a copy of same by ordinary mail with postage prepaid on this 28th day of January, 1994, addressed as follows:

John T. Moshier (SBN 007460)
RIDENOUR, SWENSON, CLEERE & EVANS, P.C.
302 North First Avenue -- Suite 900, Phoenix, Arizona 85003 Attorneys for Plaintiff Performance Industries, Inc.

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